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Hon. Reed E. Hundt  
Federal Communications Commission  
Room 814  
1919 M Street, N.W.  
Washington, D.C. 20554

Re: *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to the Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service -- MM Docket No. 94-131 -- EX PARTE COMMUNICATION*

Dear Chairman Hundt:

I am writing on behalf of Applied Video Technologies, Inc. ("AVT") to express AVT's strong support for the proposal by The Wireless Cable Association International, Inc. ("WCAI") that eligibility to participate in the first filing window for new Multipoint Distribution Service ("MDS") licenses be restricted to those accumulating the critical mass of channels necessary to successfully launch a wireless cable system.

AVT was founded by pioneers in the wireless cable industry. Several of AVT's principals were directly responsible for the successful development of the wireless cable system in Charlottesville, VA, one of the first operating systems in the nation. One of AVT's principals has been a member of WCAI's Board of Directors for several years. AVT currently holds a significant interest in the wireless cable system in Atlanta, GA and, through affiliated companies, has spent more than three years developing systems in other metropolitan areas in the southeastern United States.

AVT's ability to launch wireless cable systems in several of those markets has been hampered, however, by the lack of available MDS channels. As the Commission is well aware, a wireless cable system must have access to most of the thirty-three available MDS and Instructional Television Fixed Service ("ITFS") channels in its market in order to successfully compete against hardwire cable systems. Although AVT has agreements to lease excess capacity from applicants for, or licensees of, virtually every ITFS channel in AVT's markets, AVT has been unable to gain similar access to the MDS channels. In most cases, that is because the MDS channels are simply not available -- each of these MDS channels was once conditionally licensed through a lottery, but the license was forfeited when the conditional licensee failed to timely meet the conditions imposed

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upon it. Because of the Commission's long-standing moratorium on the filing of applications for new MDS stations, AVT has been unable to apply for new licenses.

AVT believes that adoption of the proposal to restrict first window eligibility to those accumulating a critical mass of channels will make most efficient usage of the Commission's scarce processing resources. AVT is ready, willing and able to launch additional wireless cable systems as soon as it secures the additional channel capacity it needs to successfully compete. By limiting the first filing window to those poised to provide effective competition to cable, the Commission can best advance its policy objective of promoting a competitive multichannel video programming distribution marketplace.

In its comments and reply comments, WCAI has proposed first window eligibility standards that best correspond to the objective -- expediting the launch of wireless cable systems. Under WCAI's proposal, the Commission would permit any entity to apply for new MDS facilities so long as that entity would have the critical mass of twenty MDS and ITFS channels available to it once it secures the available MDS channels.<sup>1/</sup> WCAI has proposed to count towards that total not only channels that are licensed, but also those applied for. Even channels applied for in applications that are mutually exclusive with other applications, or in applications that are the subject of a petition to deny, could be counted towards the 20 channel minimum for determining eligibility to file during the first window under WCAI's formulation. In such cases, however, WCAI has proposed that no new MDS license be issued unless and until the application that is mutually exclusive or that is the subject of a petition to deny is granted. AVT wholeheartedly agrees with WCAI's approach.

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<sup>1/</sup>WCAI had initially proposed a lesser standard for applications proposing to locate stations more than fifteen miles from the border of any Metropolitan Statistical Area. However, in its reply comments WCAI indicated that it was having second thoughts regarding this lesser standard. AVT believes that, in light of the recent introduction of Direct Broadcast Services, access to at least twenty MDS and ITFS channels is required for a wireless cable service to be viable even in rural areas. If the Commission retains a lower standard for rural areas, it should limit that lower standard to applications proposing stations far from Metropolitan Statistical Areas ("MSAs"). While WCAI has suggested that the lower standard be available for applications as close as fifteen miles from an MSA boundary, AVT suggests that the lower standard be limited to those systems being developed at least fifty miles from an MSA boundary. This approach is particularly important for assuring that greenmailers do not abuse the first window. One need only remember how RuralVision South, Inc. ("RuralVision") caused havoc in the wireless cable industry by filing ITFS applications proposing stations in rural areas that frustrated development of systems in nearby urban areas. To avoid a repeat of the RuralVision fiasco, it is essential that any rural exception be quite limited.

Thus, AVT must vigorously disagree with the suggestion by American Telecasting, Inc. ("ATI") that first window eligibility be open to any entities, so long as it has under its control nine channels that are actually licensed or that are proposed in applications that have been cut-off and are unopposed. This approach bears little nexus to the Commission's objective of expediting the emergence of wireless cable as an effective competitor to cable. Rather, ATI would afford first window eligibility to those who are far from launching competitive wireless cable systems, while denying eligibility to those that with access to the available MDS channels. The specific defects in ATI's scheme are addressed below.

First, it is generally accepted within the wireless cable industry that a minimum of 20 channels is necessary for a wireless cable system to be viable in today's competitive marketplace. Accordingly, WCAI's proposed first window eligibility restriction focuses on whether the entity in question will have the number of channels needed to succeed in the marketplace if it secures the available MDS channels. In contrast, ATI's approach does not ensure that the MDS applicant, if successful in securing the available MDS channels, will have sufficient channel capacity to launch its system. An entity meeting ATI's proposed benchmark -- one with nine channels already available to it -- will not necessarily be positioned to launch a new wireless cable service even if it acquires all of the remaining MDS channels during the first window. For example, if the nine channels the applicant possesses happen to be MDS channels, then there will only be at most four more MDS channels available. Even with all thirteen MDS channels, that entity would lack the critical mass of channels necessary to succeed. For this reason, AVT agrees with WCAI that any rule limiting eligibility to participate in the first filing window must consider the total number of channels the applicant will have under its programming control if its application for new MDS channels is granted.

Second, ATI's proposal would ban from first window participation entities that are on the verge of having the critical mass of channels necessary to launch a viable wireless cable system by failing to credit applicants with channels that have been applied for, but are the subject of a mutually exclusive application or a petition to deny. ATI would have the Commission believe that limiting eligibility to those with nine licensed channels "separates those who have made a commitment to wireless cable service from those whose motives are purely speculative." See ATI Reply Comments, at 5. That statement is not only nonsense, it is offensive to AVT. Indeed, AVT is a perfect example of how ATI's simplistic rule would penalize those that are quite far along in market development.

In one of AVT's markets, a principal of AVT is the licensee of three MDS channels and has pending a petition for reconsideration of the return of his application for four additional

channels. In addition, AVT's ITFS affiliates applied for all 20 ITFS channels in February 1992. After those applications were filed, rural educators sponsored by RuralVision filed competing applications. Although the applications filed by AVT's affiliates passed cut-off in February 1993 -- more than two years ago -- four of the five remain pending! One set of those mutually exclusive applications has been subject to the Commission's procedures under Section 74.913 for selecting among mutually exclusive ITFS applicants, and AVT's affiliate prevailed. Because all of AVT's affiliates proposed to serve one set of schools, and because all of RuralVision's affiliates proposed to serve a second, smaller set of schools, it is crystal clear that AVT's affiliates will ultimately secure all 20 ITFS channels in the market. It is simply a matter of time before the Commission's ITFS application processing staff can prepare the necessary paperwork.

As this example demonstrates, ATI's proposal for first window eligibility is unduly restrictive and will ultimately delay the introduction of wireless cable by entities, such as AVT, that are quite close to launching service. Moreover, requiring applications to be not mutually exclusive as ATI suggests could prove a bonanza for greenmailers. Under certain circumstances, a greenmailer would have a perverse incentive to arrange for the filing of a strike ITFS application that is mutually exclusive with an ITFS application sponsored by the legitimate operator. That would be true even if that greenmail application would ultimately lose under the Commission's point system for comparing ITFS applications, for the mere filing of a mutually exclusive application would prevent the legitimate operator from claiming eligibility to participate in the first window.<sup>1/</sup> The greenmailer would then be positioned to demand a financial settlement for withdrawing its ITFS application, eliminating the mutual exclusivity, and affording the operator first window eligibility.

To avoid these flaws in ATI's proposal, the Commission should permit an MDS applicant to count pending mutually exclusive applications towards the minimums needed to participate in the first window. However, no license would be issued unless and until there is a favorable resolution of the mutual exclusivity. For example, if a prospective wireless cable operator is the licensee of four MDS channels and has agreed to lease sixteen ITFS channels from entities that have pending applications subject to mutually exclusive applications, that operator should be permitted to participate in the first window. That operator should not be granted any new MDS license, however, unless and until the Commission has granted its ITFS affiliates their ITFS licenses. If those ITFS applications are dismissed or denied, the operator would lose its first window eligibility and its MDS application would be dismissed, without prejudice to re-filing in

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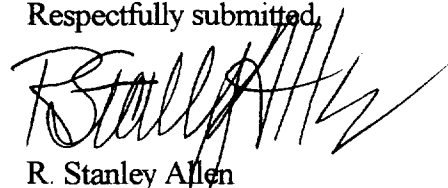
<sup>2/</sup>That such could happen is hardly fantasy on AVT's part. RuralVision, for example, demonstrated how easy it is to get naive local educators to apply for new ITFS facilities that frustrate wireless cable system development in adjacent markets.

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subsequent windows.<sup>1/</sup> This way, the Commission can assure that those who gain licenses during the first filing window have a full channel complement, while at the same time eliminating any incentive to file strike ITFS applications.

Thank you for your consideration of AVT's views. If I can provide any further information regarding AVT or the impact of first window eligibility on AVT, please feel free to contact me.

Respectfully submitted,



R. Stanley Allen  
President

cc: Hon. James H. Quello  
Hon. Andrew C. Barrett  
Hon. Susan Ness  
Hon. Rachelle B. Chong  
Roy J. Stewart  
Robert M. Pepper  
Barbara Kreisman  
Sharon Bertelsen  
Jerianne Timmerman

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<sup>3/</sup>In a desperate attempt to disparage WCAI's proposal, ATI asserts that "to give a filer credit for channels represented only by a pending, cut-off application is to imply that the remaining processing function of the Commission is no more than a ministerial rubber stamp." ATI Reply Comments, at 11. That is absurd. The approach advanced by WCAI and endorsed by AVT recognizes that not all pending ITFS applications will be granted and accommodates that fact by delaying any action on first window MDS applications until the applicant actually has access to the number of licensed channels equal to twenty minus the number of MDS channels applied for.